Supreme Court, U.S.
FILED

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

BARBARA BULLITT CHRISTIAN, ET AL.,
PETITIONERS,

v.

BEARGRASS CORPORATION, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky

PETITION FOR WRIT OF CERTIORARI

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68 pp

QUESTION PRESENTED FOR REVIEW

1. Whether the Petitioners were deprived of due process of law and the right to a fair adjudication of their appeal when the state appellate courts failed to follow clear, timely and unambiguous controlling precedent granting the Petitioners a right to a trial by jury.

2. Whether the Petitioners were deprived of due process when the trial court changed in mid-trial from a jury trial to a bench trial with an advisory jury well after the Petitioners had begun presentation of their case.

LIST OF PARTIES TO PROCEEDINGS BELOW

Pursuant to Sup. Ct. R. 14(b), the Petitioners submit the following list of parties to the proceedings before the Supreme Court of Kentucky and the Court of Appeals of Kentucky.

The Petitioners, who were Plaintiffs-Appellants below, are:

Barbara Bullitt Christian;
Barbara Porter Watkins;
Lowry Watkins Jr.; and
Marshall Bullitt Watkins (deceased).

The Respondents, who were Defendants-Appellees below, are:

Beargrass Corporation;
Estate of Thomas Walker Bullitt;
Kay E. Bullitt;
National City Bank;
PNC Bank;
Nina Leake Richardson;
Scott Richardson;
Nora Leake Cameron;
Nora Christian Skye Cameron; and
Rory Cameron.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES TO PROCEEDINGS BELOW .. ii

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT 7

I. THE REFUSAL OF THE STATE APPELLATE COURTS TO FOLLOW CONTROLLING STATE LAW, WHICH AFFORDED THE PETITIONERS THE RIGHT TO A JURY TRIAL, VIOLATED DUE PROCESS 7

TABLE OF CONTENTS (CONT'D)

Page

II. THE PETITIONERS WERE DEPRIVED OF THEIR DUE PROCESS RIGHT TO FUNDAMENTAL FAIRNESS WHEN THE TRIAL COURT CONVERTED THE PROCEEDINGS TO A BENCH TRIAL IN THE MIDDLE OF THE TRIAL 14

CONCLUSION 17

APPENDIX

JUNE 11, 1997 ORDER OF THE KENTUCKY SUPREME COURT DENYING DISCRETIONARY REVIEW ..... App. 1

AUGUST 23, 1996 UNPUBLISHED OPINION OF THE KENTUCKY COURT OF APPEALS ..... App. 2

DECEMBER 9, 1994 TRIAL COURT FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ..... App. 15

MARCH 18, 1993 PUBLISHED DECISION OF THE SUPREME COURT OF KENTUCKY ..... App. 35

TABLE OF CITED AUTHORITIES

Cases **Page**

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 12

First Kentucky Trust Co. v. Christian, 849 S.W.2d 534 (Ky. 1993) 2-6

Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18 (1981) 15

Montilla v. Immigration and Naturalization Service, 926 F.2d 162 (2d Cir. 1991) 13

Morton v. Ruiz, 415 U.S. 199 (1974) 13

Richards v. Jefferson County, Alabama, 116 S. Ct. 1761 (1996) 11

Sanders v. Needy, 363 S.W.2d 114 (Ky. 1962) 5

Steelvest, Inc. v. Scansteel Service Center, Inc., 908 S.W.2d 104 (Ky. 1995) 6-10,12-13

Truax v. Corrigan, 257 U.S. 312 (1921) 11,13

United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) 13

OPINIONS BELOW

The June 11, 1997 Order of the Supreme Court of the Commonwealth of Kentucky denying the Petitioners' motion for discretionary review is set forth in the Appendix at App. 1. The Supreme Court of the Commonwealth of Kentucky did not issue any opinion in connection with denying the motion for discretionary review. The opinion of the Court of Appeals of the Commonwealth of Kentucky, Chief Judge Wilhoit writing for the Court, dated August 23, 1996 is unreported and is set forth in the Appendix beginning at App. 2 .

STATEMENT OF JURISDICTION

The order of the Supreme Court of the Commonwealth of Kentucky sought to be reviewed here was entered on June 11, 1997. This Court has jurisdiction to review that order under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1 provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an action for breach of fiduciary duties, in which plaintiffs below and Petitioners herein seek to recover money damages in excess of $1 million, and other affirmative relief against defendants below and Respondents herein, for severe losses incurred by the Petitioners as a result of the actions of the Respondents with respect to the administration of two family trusts.

As recognized by the opinion of the Court of Appeals, the underlying facts of the controversy are summarized in the prior published opinion of the Kentucky Supreme Court in *First Kentucky Trust Co. v. Christian*, 849 S.W.2d 534 (Ky. 1993) (Justices Reynolds and Spain dissenting) which affirmed the Opinion of the Kentucky Court of Appeals (Judge Wilhoit dissenting) reversing the trial court and remanding the case. [hereinafter "*Christian I* "] (App. 4).

Petitioners are the beneficiaries of two family trusts, one created by William Marshall Bullitt, and one created by his wife, Nora I. Bullitt, for the benefit of their children--Barbara Bullitt Christian (one of the Petitioners herein), Nora Bullitt Leake (deceased 1980), and Thomas W. Bullitt (deceased 1991).

The William Marshall Bullitt Testamentary Trust (the "testamentary trust") took effect upon the death of the settlor in 1957, and at all times pertinent hereto has been the owner of 66-2/3% of the real property where the Oxmoor Shopping Center is situated, in Louisville, Kentucky. The testamentary trust holds the real property interest for the benefit of the settlor's daughters and their heirs (the remaining 33-1/3% interest in the real property passed outright to the settlor's son, Thomas W. Bullitt upon the demise of the settlor's widow).

The Nora I. Bullitt Inter Vivos Trust (the "inter vivos trust") took effect in 1969, pursuant to a declaratory judgment of the Jefferson County, Kentucky Circuit Court, which recognized the creation of the inter vivos trust, and permitted the testamentary trust to lease its real property to the inter vivos trust through a lease to the Beargrass Corporation--100 % of whose capital stock was at that time owned by the inter vivos trust--which would develop and operate the Oxmoor Shopping Center. The inter vivos trust pledged all of its Beargrass Corporation stock as collateral security to the co-trustees of the testamentary trust. At all times pertinent hereto, Thomas W. Bullitt was co-trustee with PNC Bank of the testamentary trust which held the pledged stock, as well as a member of the Board of Directors of the Beargrass Corporation.

Upon the death of William Marshall Bullitt's widow, Nora, in 1976, 33⅓ % of the Beargrass Corporation's stock passed outright to Thomas W. Bullitt. The inter vivos trust provided that the remaining 66⅔% of the stock be retained in trust for the benefit of Nora Bullitt's two

daughters (Thomas Bullitt's sisters). 100% of the stock remained pledged collateral of the testamentary trust.

The movants' complaint before the trial court below alleges that in 1977, shortly after his mother Nora's demise, Thomas W. Bullitt managed to wrest a majority ownership of the shares of the Beargrass Corporation from the inter vivos trust by arranging for the issuance of additional shares of stock in the Beargrass Corporation, which he purchased for pennies on the dollar through subterfuge and self-dealing, and in breach of the numerous fiduciary duties he owed to his sisters. The complaint further alleges that the bank defendants below, acting as trustees with respect to the testamentary trust, the inter vivos trust, or both, breached their fiduciary duties to the plaintiffs below by acquiescing in or facilitating this takeover of the Beargrass Corporation (and, therefore, of the Oxmoor Shopping Center), and by failing to block this takeover, which was clearly contrary to the interests of the trust beneficiaries, Thomas Bullitt's two sisters.

As recognized by the decision of the Court of Appeals, Petitioners' second amended complaint against Respondents alleged breach of fiduciary duties, and sought money damages, in addition to other affirmative relief (App. 6).

Initially, the trial court dismissed Petitioners' claims as being barred by the statute of limitations. However, in *Christian I*, (App. 35) the Kentucky Supreme Court held that Petitioners' claims against the Respondents were not barred by the statute of limitations, and remanded the case for trial.

On remand to the trial court, following *Christian I*, the Respondents moved for a bench trial, on the grounds that Petitioners sought purely equitable relief and, therefore, had no right to trial by jury. However, the trial court *denied* Respondents' motions in this regard, and recognized Petitioners' rights to trial by jury. The case was called for trial, a jury was impaneled, and plaintiffs began presenting their case in the Jefferson County, Kentucky Circuit Court on April 5, 1994.

However, a week into the jury trial, on April 14, 1994, as Petitioners were preparing to offer their expert witnesses on trust law and fiduciary duty, and to close the presentation of their case-in-chief to the jury, the trial court, *sua sponte*, determined to transform the trial by jury into a bench trial, and to use the sitting jurors as an advisory jury only; the court relied on Kentucky Civil Rule 39.03 and the decision of the Kentucky Supreme Court in *Sanders v. Needy*, 363 S.W.2d 114 (Ky. 1962), in support of this ruling. The Petitioners and all Respondents save National City Bank vigorously objected to this unusual mid-trial transubstantiation, but the trial court overruled all objections of both Plaintiffs and Defendants. Petitioners, now denied their right to put expert evidence before the jury as to standards fiduciary duty and trust law, concluded presentation of their case and defendants presented their defense (the trial now in the form of a bench trial with an advisory jury).

Thereafter, the court gave its instructions to the jury, along with a special verdict form containing 33 pages of specific interrogatories, most of which called for a "yes" or "no" response. The jury retired and deliberated briefly, and returned the special verdict form with the first

30 pages of interrogatories unanswered. Only the last three interrogatories were answered, absolving defendants from any liability to plaintiffs.

The trial court, treating the jurors as an advisory jury only, adopted the last three interrogatories answered on the special verdict form returned by the jury as the findings of fact of the court, made rulings of law thereon, and entered judgment in favor of Respondents.

On appeal, Chief Judge Wilhoit, writing for the Court of Appeals, first held that, notwithstanding the Kentucky Supreme Court's prior decision in *Christian I*, Petitioners' claims against Thomas W. Bullitt were barred by the statute of limitations. (App. 8)

With respect to the unprecedented proceedings below, where the trial court converted a jury trial into a bench trial in mid-trial, and transformed the sitting jury into an advisory jury, the Court of Appeals held that, notwithstanding Petitioners' claims for money damages, Petitioners' action was wholly equitable in nature and that Petitioners accordingly had no right to a jury trial (App. 9). In addition, the Court of Appeals held that the trial court's mid-trial conversion from jury to bench trial did not constitute reversible error because plaintiffs had not sufficiently shown any resulting prejudice (App. 11).

The Petitioners, in their reply brief to the Court of Appeals, brought to that court's attention the recent decision of the Supreme Court of Kentucky in *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 908 S.W.2d 104 (Ky. 1995), which held that in civil actions for breach of fiduciary duties where the plaintiff seeks, *inter alia*,

money damages, the plaintiff's right to a trial by jury, is inviolate in Kentucky. Nevertheless, the Court of Appeals' decision (Judge Wilhoit writing for the Court) did not even mention the *Steelvest* decision, much less distinguish the case even though it was the central issue raised on appeal.

The Petitioners timely filed a motion with the Supreme Court of Kentucky seeking discretionary review of the judgment of the Court of Appeals. In that motion, the Petitioners specifically cited to the *Steelvest* decision and argued that the Court of Appeals decision deprived them of their right to trial-by-jury as recognized under state law. The motion also sought review on the basis that the trial court's decision to transform the case from a jury trial to a bench trial in the middle of the proceedings was intrinsically arbitrary, capricious and prejudicial.

In an order dated June 11, 1997, the Kentucky Supreme Court, without comment, denied the motion for discretionary review without elaboration. (App. 1)

ARGUMENT

I. THE REFUSAL OF THE STATE APPELLATE COURTS TO FOLLOW CONTROLLING STATE LAW, WHICH AFFORDED THE PETITIONERS THE RIGHT TO A JURY TRIAL, VIOLATED DUE PROCESS.

The prejudicial error committed by the trial court in depriving the Petitioners of the right to a jury trial,

discussed *infra*, was compounded on appeal to the Kentucky Court of Appeal and the Kentucky Supreme Court. After judgment was entered in the trial court but while the case was pending before the Court of Appeals, the Kentucky Supreme Court issued its decision in *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 908 S.W.2d 104 (Ky. 1995), in which it was unequivocally recognized that in a civil action alleging breach of fiduciary duties and seeking damages, the plaintiff has an *absolute* right to trial by jury under the Kentucky Constitution. Despite this ruling, and the fact that *Steelvest* was specifically cited to the Kentucky Court of Appeals, that court simply ignored the decision and failed to even attempt to distinguish the case. *Steelvest* also was cited to the Kentucky Supreme Court, but that court refused to grant the Petitioners' motion for discretionary review without explanation.

A review of the essential holding in the *Steelvest* case demonstrates that the state courts have completely ignored and refused to apply established state law to the Petitioners. In *Steelvest* the Kentucky Supreme Court stated: "The constitutional right to a jury trial cannot be annulled, obstructed, impaired, or restricted by legislative or judicial action." In pertinent parts the *Steelvest* court also ruled as follows:

> "It [Kentucky Civil Rule 39] has been used to deny a jury trial where there are raised issues of law and fact and it has broadened the range of application beyond cases of account. C.R. 39 shall, therefore, be redrafted as to be in conformity with

Section 7 of the Kentucky Constitution" [right to trial by jury inviolate]. . . .

. . . [C]auses of action historically legal are triable by jury and causes of action historically equitable are triable by the court--notwithstanding the rule. Thus, *if both legal and equitable issues are joined in a single cause of action, the appropriate mode of trial must be followed as to each*, and in that sequence which will promote efficient administration without curtailing the substantive rights of the respective parties.

. . . The right to a jury trial is secured by the state constitution and cannot be taken away or placed at the discretion of the trial judge by converting a legal right into an equitable one or by giving the trial judge an exclusive right to try legal issues because there is some equitable right that arises out of the establishment of the legal issues so as to infringe upon the right of a trial by jury.

> . . . It is the pleadings--not the proof--which are determinative of whether legal or equitable issues are involved. *Brandenburg v. Burns*, Ky., 451 S.W.2d 413 (1969); *Republic Coal Co. v. Ward*, 191 Ky. 368, 230 S.W. 295 (1921). The action now under consideration does

> not involve an equitable accounting and is one at law for damages wherein the pleadings do not assert any equitable cause or defense. Additionally, the *fact that a number of items are involved does not convert a legal issue into an equitable one. Shatz v. American Surety Company of New York*, Ky., 295 S.W.2d 809 (1955); *Brandenburg, supra.*
>
> A civil cause of action for damages sustained "is the classical textbook paradigm of an action at law wherein '[t]he constitution guarantees a trial by jury in cases of this character.'" *Meyers v. Chapman Printing Co., Inc.*, Ky., 840 S.W.2d 814 (1992).

Steelvest, 908 S.W.2d at 108-09 (emphasis added; citations omitted). That *Steelvest* controlled in this case and required reversal of the trial court's decision to arbitrarily convert a jury trial into a bench trial cannot be doubted.

Yet the Kentucky appellate courts inexplicably refused to follow *Steelvest*, or for that matter even explain why controlling precedent allowing litigants a right to a jury was not applicable to the Petitioners. Under the circumstances, this refusal to follow *Steelvest* can only be considered the kind of arbitrary and capricious state action which violates the Fourteenth Amendment's guarantee to due process. This Court long ago recognized that one

essential aspect of due process is the right to judicial determinations in accordance with the law:

> The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society. . . . Our whole system of law is predicated on the general fundamental principle of equality of application of the law. "All men are equal before the Law," "This is a government of laws and not men," "No man is above the law," are maxims showing the spirit in which Legislatures, executives, and courts are expected to make, execute and apply laws.

Truax v. Corrigan, 257 U.S. 312, 332 (1921) (citation omitted).

Although states and state courts have the power to establish substantive rules and rules of procedure for the consideration of claims brought in those courts, this Court has recognized more recently that such rules must be consistent with the guarantees of the Due Process Clause of the Fourteenth Amendment. This Court reiterated this requirement in *Richards v. Jefferson County, Alabama*, 116 S. Ct. 1761, 1765 (1996), holding that a state court's application of rules of *res judicata* must be consistent with

fundamental federal rights. This Court recognized there that "the guarantee of due process is not a mere form," *id.* at 1765, and that there are cases in which a state may not deprive individual litigants of their own day in court.

Richards relied upon the decision in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), which declared unconstitutional a state court's decision overruling established state precedent. While conceding the authority of state instrumentalities to declare the laws of the state, the decision went on to state as follows:

> Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. . . . [W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Id. at 681-82.

The Kentucky Courts' decision that the benefit of the *Steelvest* ruling should not be extended to the Petitioners cannot be justified as a legitimate exercise of

the power of those courts to establish rules of law and procedure. No reason was given by the state courts for ignoring *Steelvest*. Given the obvious application of the right to a jury trial recognized in that case to the claims brought by the Petitioners, the state courts' failure to apply that case can only be considered arbitrary. The Petitioners have been deprived of their due process right to have the protection of the general laws and rules of the Commonwealth of Kentucky. *Truax*, 257 U.S. at 332.

This same principle finds application in cases recognizing that it is fundamentally unfair for a governmental entity to fail to follow its own rules. "When the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). The doctrine that governmental entities must follow their own rules is premised on fundamental notions of fair play underlying the concept of due process. *Montilla v. Immigration and Naturalization Service*, 926 F.2d 162, 167 (2d Cir. 1991) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)). "The notion of fair play animating [the guarantee to due process] precludes an agency from promulgating a regulation affecting individual liberty or interest, which the rulemaker may then with impunity ignore or disregard as it sees fit." *Montilla*, 926 F.2d at 164.

That notion of fundamental fairness and equal justice implicit in the guarantee to due process was plainly violated by the Kentucky courts in this case. For those courts to refuse to apply the same law enunciated in the *Steelvest* case to the Petitioners' case cannot be squared with the principle that due process requires a litigant's

case be decided in accordance with general law. The decisions below in this case rested upon the whim and caprice of the state courts, which offends the Fourteenth Amendment and must not be allowed to stand.

II. THE PETITIONERS WERE DEPRIVED OF THEIR DUE PROCESS RIGHT TO FUNDAMENTAL FAIRNESS WHEN THE TRIAL COURT CONVERTED THE PROCEEDINGS TO A BENCH TRIAL IN THE MIDDLE OF THE TRIAL.

Despite its initial ruling that the Petitioners were entitled to a jury trial on their claims and the fact that the trial had proceeded for a week before a jury, the trial court took the bizarre step of reversing itself mid-trial and ordering that the case be tried to the bench with the jury acting in an advisory capacity only. This action on the part of the trial court was, and is, unprecedented in Kentucky and American jurisprudence; where litigants are entitled by law to a jury trial no authority exists for the conversion of a jury trial to a bench trial in the middle of the proceedings.

The profound effects that this unprecedented and, as discussed *supra*, unwarranted decision to convert the trial to a bench trial had upon the Petitioners' case cannot be understated. The Petitioners' preparation and presentation of their case had been tailored and directed for a jury. Without warning, the trial court suddenly changed the entire context of the trial after the Petitioners had already committed themselves to presentation of the case in a particular manner to a jury. After the conversion

the trial court bifurcated the evidentiary standard between questions of fact and questions of law, denying Petitioner the ability to put evidence of trust standards and standards of fiduciary duty before the advisory jury, effectively quitting the Petitioner's case.

This action of the trial court in ambushing the Petitioners after they had committed themselves to presenting the case to a jury, contravenes the basic concept of fundamental fairness embodied in the due process clause of the Fourteenth Amendment. Petitioners have not found one reported decision in any American jurisdiction which has approved such a bizarre alteration of a judicial forum. The lack of such authority indicates that such action is, to say the least, highly unusual and an extreme departure from ordinary standards of fairness and due process.

In *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18, 24-25 (1981), this Court stated as follows:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L. Ed. 2d 1230. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty.

> Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Thus, whether a litigant has been denied due process depends upon the circumstances of the particular action which is challenged.

The circumstances surrounding the trial court's conversion of the jury trial to a bench trial simply do not comport with fundamental fairness. A litigant is entitled to a hearing and trial by orderly procedures of which he or she has notice. It is only then that the litigant can adequately prepare and present his or her case. When, as in the instant case, the "rules of the game" are changed in the middle of trial and in the course of the presentation of his or her case, the proceedings can in no way be considered fair. As a consequence, the results of those proceedings should be voided in the interest of due process.

CONCLUSION

For the reasons set forth above, the Petitioners respectfully request that this Court grant the Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Kentucky.

Respectfully submitted,

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SUPREME COURT OF KENTUCKY

96-SC-847-D
(95-CA-1027)
(95-CA-1028)
(95-CA-935)

BARBARA BULLITT CHRISTIAN, ET AL.
MOVANTS

Jefferson Circuit Court
v. 89-CI-9732

BEARGRASS CORPORATION, ET AL.
RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Entered June 11, 1997.

/S/ Robert F. Stephens
Chief Justice

RENDERED: August 23, 1996; 10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

95-CA-0935-MR

BARBARA BULLITT CHRISTIAN; BARBARA PORTER WATKINS; LOWRY WATKINS, JR.; and MARSHALL BULLITT WATKINS

Appellants

Appeal From Jefferson Circuit Court
v. Honorable Edwin A. Schroering, Jr., Judge
Action No. 89-CI-9732

BEARGRASS CORPORATION; ESTATE OF THOMAS WALKER BULLITT; KAY E. BULLITT; NATIONAL CITY BANK (FORMERLY First Kentucky Trust Company); PNC BANK (Formerly Citizens Fidelity Bank & Trust Company); NINA LEAKE RICHARDSON; SCOTT RICHARDSON (A Minor); NORMA LEAKE CAMERON; NORA CHRISTIAN SKYE CAMERON; and RORY CAMERON (A Minor)

Appellees

AND 95-CA-1027-MR

PNC BANK KENTUCKY (f/k/a Citizens Fidelity Bank & Trust Company)

Cross Appellant

v. Cross-appeal From Jefferson Circuit Court
Honorable Edwin A. Schroering, Jr., Judge
Action No. 89-CI-9732

BARBARA BULLITT CHRISTIAN; BARBARA PORTER WATKINS; LOWRY WATKINS, JR.; and MARSHALL BULLITT WATKINS

Cross-Appellees

AND 95-CA-1028-MR

PNC BANK OF KENTUCKY, INC. (Executor of the Estate of Thomas Bullitt)

Cross-Appellant

v. Cross-appeal From Jefferson Circuit Court Honorable Edwin A. Schroering, Jr.
Action No. 89-ci-9732

BARBARA BULLITT CHRISTIAN; BARBARA PORTER WATKINS; LOWRY WATKINS, JR.; and MARSHALL BULLITT WATKINS

Cross-Appellees

OPINION AFFIRMING

BEFORE: WILHOIT, Chief Judge; COMBS and HUDDLESTON, Judges. WILHOIT, CHIEF JUDGE. Barbara Bullitt Christian and her children, Barbara Porter Watkins; Lowry Watkins, Jr.; and Marshall Bullitt Watkins, appeal from a judgment entered after a trial, dismissing their complaint against the Estate of Thomas W. Bullitt and others seeking relief from alleged breaches of fiduciary duties and

mismanagement of trust assets. The cross-appeals are from the denial of the cross-appellants' motion to dismiss the complaint as barred by the statute of limitations.

The underlying facts of this controversy are summarized in *First Kentucky Trust Co. v. Christian*, Ky., 849 S.W.2d 534 (1993). Mrs. Christian and her children initiated this litigation to pursue remedies for the consequences of Thomas W. Bullitt's purchasing convertible debentures in 1977 which had the effect of increasing his proportionate share of a family-owned business. Mrs. Christian, Mr. Bullitt, and Nora Bullitt Leake were the children of William Marshall Bullitt and Nora Iasigi Bullitt. William Marshall Bullitt died in 1957. Thomas W. Bullitt served as the sole trustee of the William Marshall Bullitt Trust (WMB Trust) until he petitioned the court to appoint Citizens Fidelity Bank and Trust Company (now PNC Bank)as co-trustee in 1961. The major asset of the WMB Trust was the property on which Oxmoor Center, a large shopping mall in Jefferson County, is located. The WMB Trust provided for a life estate in his wife, and upon her death an undivided one-third interest would pass in fee to Thomas W. Bullitt. The remaining undivided two-thirds interest would remain in trust for the benefit of Mrs. Christian and Mrs. Leake and their children for their lives with remainder to the great-grandchildren of William Marshall Bullitt and Nora Iasigi Bullitt.

The Nora Iasigi Bullitt Trust (NIB Trust) was an irrevocable inter vivos trust created in 1969. The corpus of the NIB Trust was Beargrass Corporation stock. Beargrass Corporation was created to develop and manage Oxmoor Center and it holds the long-term lease on the shopping center; all of the stock was pledged to secure the lease. The commercial development of the Oxmoor property was approved by the Jefferson Circuit Court in a declaratory judgment. The provisions of the NIB Trust mirrored those of the WMB Trust,

i.e., the NIB Trust held all of the Beargrass Corporation stock during Mrs. Bullitt's lifetime. At her death in 1976, Thomas W. Bullitt received one-third of the stock in fee, and the NIB Trust held two-thirds of the stock for the benefit of Mrs. Christian and Mrs. Leake and their children for their lives with remainder to their grandchildren. First Kentucky Trust Company (now National City Bank) is the sole trustee of the NIH Trust. The NIB Trust also provided that the trustee shall vote the shares of Beargrass Corporation stock only as directed by Thomas W. Bullitt, Mrs. Christian, and Mrs. Leake, or a majority of them. Other actions of the trustee were also subject to the direction of a majority of Mrs. Bullitt's three children.

This litigation is the result of the June 1977 action of the Beargrass Corporation Board of Directors to authorize the issuance of convertible debentures for the stated purpose of financing repairs to and the remodeling of Oxmoor Center. The convertible debentures were offered to the shareholders of the corporation, Thomas W. Bullitt and the NIB Trustee who were permitted to subscribe pro rata and in proportion to their respective ownership of stock in Beargrass Corporation. The board of directors of Beargrass Corporation was comprised of Thomas W. Bullitt; his law firm partner, John S. Osborn, Jr.; Thomas W. Bullitt's wife, Kay E. Bullitt; Mrs. Leake and one of Mrs. Leake's daughters. The minutes from the June 9, 1977, board of director's meeting reflected that Mr. Osborn proposed the convertible debenture plan; the motion to accept the proposal was made by Mrs. Leake and seconded by her daughter.

The NIB Trust had no assets with which to purchase the convertible debentures as the net income of the trust was distributed to its beneficiaries. An officer of First Kentucky Trust discussed the subscription offer with Mrs. Christian. She declined to lend the NIB Trust money to purchase the debentures or to purchase the debentures herself on behalf of

the NIB Trust. Thomas W. Bullitt purchased debentures, and in 1979 he exercised the option to convert them into Beargrass Corporation common stock. By reason of this conversion, his proportionate ownership interest in Beargrass Corporation rose from a one-third interest to a 60 percent interest. The interest of the NIB Trust in Beargrass Corporation accordingly was reduced from a two-thirds interest to a 40 percent interest.

Mrs. Christian's son, Lowry Watkins, Jr., initially filed suit against Thomas W. Bullitt, co-trustee of the WMB Trust; First Kentucky Trust Company, trustee of the NIB Trust; and Beargrass Corporation. Mrs. Christian's other son, Marshall Bullitt Watkins filed a separate suit against the same defendants which was consolidated with his brother's suit. The first amended complaint added as plaintiffs Mrs. Christian and her daughter, Barbara Porter Watkins. The circuit court dismissed the action against First Kentucky Trust on statute of limitation grounds, which dismissal was reversed. See *First Kentucky Trust Co. v. Christian, supra.* After the action was remanded to the circuit court, a second amended complaint was filed against the Estate of Thomas Walker Bullitt, who had died in 1991; Beargrass Corporation; Thomas W. Bullitt's widow, Kay E. Bullitt; National City Bank (formerly First Kentucky Trust Company); PNC Bank (formerly Citizens Fidelity Bank & Trust Company); John S. Osborn, Jr.; and the children and grandchildren of Nora Bullitt Leake. Mrs. Leake had died in 1980.

The plaintiffs alleged in the second amended complaint that Thomas W. Bullitt, as co-trustee of the WMB Trust, attorney for the WMB and NIB trusts, and director and chairman of the Beargrass Corporation, breached numerous fiduciary duties owed to them. They alleged that the Convertible debenture issuance was fraudulent and constituted a scheme by which Thomas W. Bullitt could gain a majority interest in Beargrass Corporation. PNC Bank, as co-trustee of

the WMB Trust, was alleged to have breached its fiduciary duties by permitting its co-trustee, Thomas w Bullitt, to issue and convert the debentures. First Kentucky Trust, trustee of the NIB Trust, was alleged to have breached its fiduciary duties by failing to prevent the issuance of the convertible debentures. The plaintiffs alleged in a separate count that PNC Bank leased property from the WMB Trust below the market rate, which Constituted self-dealing as PNC served as co-trustee of the WMB Trust. Numerous other allegations were made regarding the defendants' alleged mismanagement of the assets of the NIB and Trusts and of fiduciary duties. Following a trial, the complaint was dismissed, and this appeal and the cross-appeals followed.

The appellants, Barbara Bullitt Christian; Barbara Porter Watkins; Lowry Watkins, Jr.; and Marshall Bullitt Watkins, first allege that they were denied their constitutional right to a trial by jury. A jury was impaneled, but after few days of proceedings, the circuit court ruled that it was conducting a bench trial and that it would use the impaneled jury as an advisory jury pursuant to CR 39.03. The jury was not informed of the court's decision. First Kentucky Trust was the only party at the trial level which did not object to the court's ruling; on appeal, however, all parties except the appellants contend that the Circuit court acted properly in conducting a bench trial and using an advisory jury.

The appellants also contend that the trial court's findings of fact were clearly erroneous as they relate to the alleged breaches of fiduciary duty by the named trustees regarding the issuance and subsequent Conversion of the debentures used by Beargrass Corporation to raise capital in 1977. Furthermore, the appellants submit that the trial court erroneously applied the law to those facts. Finally, the appellants raise a number of other assignments of error in the course of a three page "summary" of arguments.

On Cross-appeal, the appellees assert that the appellants' claims should be dismissed as being barred by the statute of limitation. This court finds merit with the appellees' argument, but only to the extent the appellants' claims of fraud have been leveled against parties who were not acting as trustees for either the WMB Trust or the NIB Trust.

KRS 413.120(11) provides a five-year limitations period for actions grounded in allegations of fraud, the period commencing at the time the cause of action accrued. Typically, under the circumstances of this case, the cause of action would not accrue until the fraud has been discovered. See-generally, *Hernandez V. Daniel*, Ky.6 471 S.W.2d 25 (1971). If a delay in discovery should occur, it is the plaintiff's burden to allege and prove that the fraud was not only not discovered, but that it could not be discovered earlier exercising reasonable diligence. See *Skaggs v. Vaughn*, Ky. App., 550 S.W.2d 574 (1977). In any event, action for relief from fraud may never be commenced more than ten years from the events constituting the alleged fraud. KRS 413.120; see also *Forman v. Gault*, 236 Ky. 213, 32 S.W.2d 977(1930).

The appellants assert that the fraud occurred in 1977 when the convertible debentures were issued and further when Tommy Bullitt converted those debentures to common stock on October 29, 1979. The appellants' initial complaint was not filed until December of 1989, and their second amended complaint, which did not incorporate any of the previously-filed complaints, was filed in December of 1993. The facts, as alleged by the appellants, place their action outside the applicable limitations period. Consequently, their claims must be dismissed. In light of the Kentucky Supreme Court's decision in *First Kentucky Trust Co. v Christian, supra*, this reasoning would not apply to the appellants' claims as trust beneficiaries against the trustees for alleged breaches of fiduciary duties by those trustees while acting in their capacity

on behalf of the trust. These claims include those against co-trustees, PNC Bank and Tommy Bullitt, as co-trustees of the WMB Trust, and trustee, First Kentucky Trust Company, as trustee of the NIB Trust. All other claims relating to the convertible debenture issuance are time barred and must be dismissed.

Generally, when a trial by jury is demanded under CR 38, the court is required to provide the same unless one of the events called for in CR 39.01 exists. CR 39.01(b) allows the court to deny a jury trial on its own initiative if it "finds that a right of trial by jury of some or all of those issues does not exist under the constitution or statutes of Kentucky ...." Causes of action which are historically legal in nature demand trial by jury, while causes of action which are historically equitable in nature may be tried by the court. See *Johnson v. Holbrook*, Ky., 302 S.W.2d 608 (1957). whether the right to trial by jury exists depends upon the issues presented in the pleadings. Furthermore, "[i]t may happen that the right to jury trial must be decided after an evaluation of the true nature and effect of the basic issues raised by the claims and defenses and the relief which may be granted to the parties." Id. at 610. Examination of the record in this case shows that the nature of the claims are equitable in nature. In fact, it would appear that the Kentucky Supreme Court has already determined as such, stating as follows:

> Certainly an express trust was created by contract, but we believe in this case the proper cause of action for breach of a fiduciary duty is controlling as an equitable rather than a technically legal action. Cf. Restatement (Second) of Trusts, Sec. 199 (1959). Here, the duties of the trustee are not based on contract, but rather on the effect of the trust conveyance.

Bogert, Trust and Trustees, Sec. 17 at 215 (Rev. 2d ed. 1982).

Christian, 849 S.W.2d at 538. The appellants were all parties before the court when it made its determination, and at no time have they alleged that it should not control. Traditionally, actions for breaches of fiduciary duty by a beneficiary against a trustee have been considered equitable in nature. See 90 C.J.S. Trusts § 454 at 875 (1955). The appellants argue that, since the relief sought is monetary, this is an action at law. Request for monetary relief by itself does not render a cause of action one at law. See generally, *Clews v. Jamieson*, 182 U.S., 461, 21 S. Ct. 845, 45 LEd. 1183 (1901). The appellants also requested the return of property, the recission of transactions, and the appointment of new trustees, all of which are equitable remedies. As this action is one in the nature of equity, the appellants had no constitutional right to trial by jury, and the trial court's determination to try the case with only an advisory jury was not error. See CR 39.03.

The appellants submit that once the trial court began the trial with the jury, it was error to then "convert" the jury to an advisory jury only. The appellants have failed, however, to show this court how the trial court's action prejudiced their case. See *Craig v Kentucky State Bd. of Elementary and Secondary Educ.*, Ky App., 902 S.W.2d 264 (1995). The jury was never told that its verdict would serve only to advise the court, and the decision of the jury and the court were in complete accord. See Generally, *Scudamore v. Horton*, Ky., 426 S.W.2d 142 (1968); *Averitt v. Bellamy*, Ky., 406 S.W.2d 410 (1966); and *First Nat'l Bank in Greenwich v. National Airlines. Inc.*, 288 F.2d 621(2nd Cir. 1961). Mere allegations that the appellants may have organized their case differently if they initially knew a trial by court would take place does not serve to show prejudice. In fact, the appellants were given the functional equivalent of a jury trial with the court adopting the

jury's findings. Regardless of the propriety of the trial court's actions on this account, the appellants have shown no prejudice and reversal is not warranted. *See Craig*, 902 S.W.2d 264.

With regard to the convertible debenture issue, the only party owing the NIB Trust beneficiaries a fiduciary duty was First Kentucky Trust Company, the trustee. Neither Tommy Bullitt nor PNC Bank had any trust relationship with the beneficiaries of the NIB Trust, at least for purposes of maintaining that trust and its corpus. The appellants spend a considerable amount of time arguing that Tommy Bullitt breached his fiduciary duty to the NIB Trust beneficiaries by purchasing convertible debentures from Beargrass Corporation. This court is at a loss to find how Tommy Bullitt became a trustee of the NIB Trust. The record clearly reflects that he was not. Consequently, all claims against Tommy Bullitt in this regard are based on simple fraud, and, as discussed previously, are barred by the applicable statute of limitation. On the other hand, the trial court found that First Kentucky Trust Company fulfilled its fiduciary duty to the NIB Trust beneficiaries. This court may not set aside the trial court' s findings of fact unless it is determined that the findings are clearly erroneous. CR 52.01. See *Karahalios v. Karahalios*, Ky. App., 848 S.W.2d 457 (1993); *Massachusetts Bonding & Ins. Co. v. Huffman*. Ky., 340 S.W. 447 (1960). Review of the record reveals that the court's findings were not clearly erroneous on this issue. As to potential breaches of fiduciary duty by trustees of the WMB Trust, the appellants have not alleged that the court's findings of fact and conclusions of law are erroneous. Consequently, this court will not review those findings.

The appellants allege a number of other errors made by the trial court which they believe call for reversal of the verdict. To the extent the appellants' brief does not show that a particular error has been preserved for review, this court will not review that alleged error. CR 76.12(4)(c)(iv); See *Elwell v.*

Stone, Ky.App., 799 S.W.2d 46 (1990). Furthermore, to the extent the appellants' brief has failed to make "ample supportive references to the record and citations to authority pertinent to each issue of law ...," this court will not review for error. CR 76.12(4) (c) (iv). It is not for us to do the work for either side in a case but to judge the case fairly as it has been properly presented by the parties. Furthermore, it is almost invariably true that if counsel does not consider an issue worthy of the expenditure of time to properly present it to us, that issue is meritless, and we should better spend our time dealing with issues of potential merit.

The appellants' only remaining argument is that the jury, in its advisory role, failed to answer the interrogatories submitted to it, and the trial court erred by making references to the jury's decision. The appellants clearly must not understand the nature of the interrogatories given to the jury. Examination of the questions shows that the jury necessarily answered the pertinent questions in the negative. In other words, it found no breach of any fiduciary duty on the part of the appellees. The jury proceeded to absolve the appellees of any wrongdoing when it rendered a verdict in their favor. The trial court may then refer to the jury's findings though they are not conclusive. See *Emerson v. Emerson*, Ky. App., 709 S.W.2d 853(1986). The court is still obliged to make independent findings of fact and conclusions of law. CR 52.01. The trial Court in this action did make independent findings of fact and conclusions of law in Conformity with CR 52.01 and reference to the jury's verdict was not impermissible. Furthermore, this court finds no error with the trial court's request for tendered findings of fact by the parties. A trial court's findings of fact based upon findings drafted by a party's counsel will not be deemed error unless the trial court "clearly abused [its] discretion and delegated fits decision-making responsibilities under CR 52.01." *Bingham v. Bingham*, Ky., 628 S.W.2d 628, 630 (1982). The appellants have failed to persuade this court that such is the case here.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE/CROSS APPELLANT
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BRIEF FOR APPELLEE BEARGRASS CORPORATION AND KAY BULLITT:

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NO. 89-CI-09732 JEFFERSON CIRCUIT COURT

DIVISION TWELVE (12)

BARBARA BULLITT CHRISTIAN, ET AL.

PLAINTIFFS

v. **FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT**

BEARGRASS CORPORATION, ET AL.

DEFENDANTS

****

This case came on for trial before the Court with an advisory jury on April 5, 1994. All parties announced ready for trial and are as follows:

1. Barbara Bullitt Christian, Lowry Watkins, Barbara Porter Watkins, and Marshall Bullitt Watkins were present and represented by the Honorable Jackson Andrews and the Honorable Edward Black.

These Plaintiffs, who in the main are the lifetime beneficiaries of the various trusts and estates in question, maintain this action against the following defendants represented by the following named lawyers:

a. PNC Bank, Kentucky, Inc., Executor of the Estate of Thomas Bullitt, deceased Wendy Armstrong, g Vice President appears for the bank. PNC Bank in this capacity is represented by the Honorable Frank Dohoney and Honorable Kevin Flannery.

b. National City Bank, Co-Trustee. Appearing for National City Bank is Robert Bigg, Vice President and Trust Officer. National City Bank is represented by the Honorable Robert Griffith and the Honorable T. Morgan Ward.

c. PNC Bank, Kentucky, Inc., as Co-Trustee of the William Marshall Bullitt Trust. In this capacity, Mr. Jim Couch, Vice President and Trust Officer appears. PNC Bank, Kentucky as Co-Trustee is represented by the Honorable R. Van Young and the Honorable Hank Alfred.

d. Kay Bullitt and the Beargrass Corporation. In appearance, as Chairman of the Beargrass Corporation, John F. Osborn. Representing Mrs. Bullitt and the Beargrass Corporation is the Honorable Robert I. Cusick and the Honorable Stephen E. Price.

e. Nina Leake Richardson and Nora Leake, appearing fo themselves and the residual beneficiaries, their children. Representing these Defendants is the Honorable Marshall Eldred and the Honorable Maureen Taylor.

All sides announced ready for trial and after the jury was selected, the trial began on April 5, 1994 and continued until April 19, 1994 when interrogatories and instructions were submitted to the jury.

INTRODUCTION

This case involves rather complicated dealings between the parties, various trusts and their trustees. The dispute centers around the control and stream of income from the trust assets between the lifetime beneficiaries and the residual beneficiaries. The Plaintiffs, which in the main constitute said lifetime beneficiaries of the various trusts, allege breaches of fiduciary duty on the part of their trustees.

A breach of fiduciary duty is an equitable claim for which there was no right to trial by jury at common law. Although a jury has been called in this case and has proceeded to a verdict, the Plaintiffs have no right to a jury trial in this case according to Kentucky law. *Johnson v. Holbrook*, Ky., 302 S.W.2d 608, 611 (1957).However, under CR 39.03 this Court can, and did, by its own motion, conduct the trial with an advisory jury.

After the presentation of proof and closing arguments, interrogatories and verdict forms were submitted to the advisory jury, whose verdict was in favor of the Defendants on all claims.

The Court is not bound to follow the verdict of an advisory jury, but its findings can be valuable to the court, particularly in dealing with problems involving good faith. See *Sanders v. Needy*, Ky. 363 S.W.2d 114, 116 (1962). This Court, applying principles of equity, will present the facts and transactions between the various trustees and their beneficiaries. The question as to whether the trustees' conduct, under the circumstances, meets the good faith test is somewhat more difficult. Apparently the jury, in this case, had very little difficulty in finding for the Defendants on all counts. There are areas which require further discussion as will be seen in the findings of fact set out hereinafter.

FINDINGS OF FACT

1. As indicated in the Introduction, this lawsuit is essentially a family quarrel in which one side of the Bullitt family contests the control and stream of income from trust assets centering around a half interest in Louisville's Oxmoor Shopping Center. The Plaintiffs are: Barbara Bullitt Christian ("Barbara")and her three adult children, Lowry Watkins, Marshall Bullitt Watkins, and Barbara Porter Watkins, who are

lifetime beneficiaries of various trusts. The Defendants are PNC Bank as executor of the estate of Thomas W. Bullitt ("Tommy"), who is the brother of Barbara Christian and the uncle of the other plaintiffs. Although Tommy was alive at the commencement of this suit, he has since passed away and his interest is pursued by his estate and widow, Kay E. Bullitt.

Beargrass Corporation, a Kentucky corporation operating the shopping center; Nora Leake Cameron, Nina Leake Richardson, Roy Cameron and Scott Richardson are either interested in or are residual beneficiaries of the estate.

The main thrust of the Plaintiffs' complaint is directed to the late Tommy Bullitt, who they claim manipulated the various trustees and corporations in their management of the various family trusts. The remaining Defendants are included because their interests might be affected by the outcome of this action.

2. The primary source of income, which is in dispute between these parties, has its beginning in considerable real estate left by the late William Marshall Bullitt, Barbara's father. Among his many interests was his family farm, Oxmoor, on which the Bullitt family lived since the late 1700's. The farm, itself, is located on what is now the intersection of Shelbyville Road and the Watterson Expressway in Jefferson County, Kentucky. It was subsequently developed into the main income producer known as Oxmoor Shopping Center.

The considerable income produced by the operation is managed by Bluegrass Inc., and ultimately finds its way from the various trusts to the parties as will be fully explained hereinafter.

3. William Marshall Bullitt died in 1957. He was survived by his wife, Nora, and children, Tommy, Barbara and

Nora Bullitt Leake (Nora), the mother of Defendants Nora Leake Cameron and Nina Leake Richardson.

William Marshall Bullitt's will left various legacies to his wife and divided the remainder of his estate between Tommy, who received one-third outright, and an express testamentary trust (the"WMB Trust") which received the remaining two-third and which, additionally, created life estates for the benefit of Barbara, Nora and their children, with remainder in fee to Barbara and Nora's grandchildren. The will made Tommy the sole executor of the WMB Trust. In 1961, Tommy and PNC Bank appointed a co-trustee of the WMB Trust. After the commencement of this suit, and Tommy's death in 1991, PNC Bank became the sole trustee of the WMB Trust.

4. Tommy was a prominent lawyer in Jefferson County, Kentucky having previously graduated from Harvard College and Harvard Law School. Because of his background and his participation as a partner in one of the largest law firms in Kentucky, Wyatt, Tarrant & Combs, he was well versed in every aspect of the law.

Nora was a graduate of Radcliffe College. After her marriage, she was a resident of Maryland until her death in 1960. Although not a college graduate, Barbara took considerable interest in various investments that she received from the trust. Some of these investments were in precious metals. But because said investments were thought to be speculative, her decisions were not favored by Tommy or by the various trustees who managed these assets.

5. Barbara's two sons, Lowry and Marshall Watkins, are not employed but maintain themselves solely from income that they received as lifetime beneficiaries of various family trusts.

Their sister, Barbara Porter Watkins is an attorney, but currently not in practice, who also relies upon income from the family trusts.

6. John Osborn, Beargrass' Chairman, who manages the shopping center is a law partner of Tommy Bullitt and is well versed in real estate law. He was originally a party to the action but was voluntarily dismissed by the Plaintiffs shortly before trial. Mr. Osborn testified at length, and was examined by both parties in this action. Mr. Osborn was certainly the most knowledgeable as far as the details of the disputed issues in this case and his testimony, in the main, was undoubtedly responsible for the findings of the jury concerning the good faith management of this corporation and of Tommy Bullitt.

Beargrass Corporation

7. Beargrass Corporation, which actually operates the shopping center, was created in 1969 by the Bullitt Family to develop that part of Oxmoor Farm adjacent to what is now Shelbyville Road. At the time of its incorporation, all seventy (70) shares of Beargrass' issued stock were owned by Nora I. Bullitt. In addition to this stock, there were 5,930 shares of authorized but unissued stock. Lowry Watkins, one of the four plaintiffs and an incorporator of this corporation, passed By laws prohibiting shareholders from retaining the right to approve the issuance of authorized stock.

8. After its incorporation, and with the approval of the Jefferson Circuit Court, Beargrass leased a portion of Oxmoor farm from the WMB Trust. It then entered into a Joint venture Agreement with Winmar Corporation ("Winmar"), a national real estate developer based in Seattle, Washington, whose projects in the Louisville area include some of the largest buildings in the downtown area. Under the terms of the Joint Venture Agreement, the income from the joint venture

was divided evenly between Winmar and Beargrass. The Agreement also fixed the initial capital contributions between the joint venturers but left for future agreement the allocation of future capital contributions.

The Nora I. Bullitt Trust

9. After Beargrass was incorporated and had entered into the Joint Venture Agreement with Winmar, Mrs. Bullitt created the Nora I. Bullitt Trust ("NIB Trust"). The sole asset of this trust was the seventy shares of stock that she owned in Beargrass. Pursuant to the terms of the Trust Agreement (the "Trust Agreement"), First Kentucky was made Trustee. According to John Osborn, First Kentucky was chosen because no family member banked with its parent corporation, then First National Bank of Louisville.

10. The original life beneficiaries of the NIB Trust were Tommy, Barbara, and Nora. Upon Mrs. Bullitt's death in 1976, the 70 shares of stock had grown to be 1,500 shares through stock splits. Pursuant to paragraph 2.01 of the Trust Agreement, 500 shares of Beargrass Stock, amounting to one-third of the stock held by the NIB Trust, were distributed free of trust to Tommy. The remaining two thirds of the Trust corpus (1,000 shares) of Beargrass stock, remained in trust for Nora B. Leake and Barbara B. Christian, to share and share alike, for their respective lives, the income to be applied for the support of them and their present five children, Nora Leake Cameron, Nina Leake Richardson, Barbara Porter Watkins, Lowry Watkins, Jr., and Marshall Bullitt Watkins for their lives--the issue of any of those five who may be deceased shall take absolutely and free of trust such share as his, her or their parent would have taken if living.... The 1,000 shares which remained in trust after Mrs. Bullitt's death was, of course, a majority of the shares of the corporation at that time.

11. The income from the NIB Trust has been distributed pursuant to a Settlement Agreement dated August 30, 1976 between Barbara, Nora and their respective children. According to the Agreement, First Kentucky pays income from the Trust to all four plaintiffs, as well as to Nora Leake Cameron and Nina Leake Richardson.

12. The powers of First Kentucky, with respect to the Beargrass Corporation, were limited under the terms of Article IV of the Trust Agreement. Under that Article, Mrs Bullitt created what is in effect an Advisory Committee consisting of her three children (and upon their respective deaths, Tommy's personal representative or the Trustee named in his will. and the eldest living child of Nora and Barbara). The Trust Agreement provides that First Kentucky "is expressly prohibited from selling or otherwise disposing of any share of Beargrass Corporation unless directed in writing by a majority of the committee;" this Committee "shall vote the shares of Capital Stock of Beargrass Corporation only as directed "by a majority of the Committee; and would "have the power to consent to or oppose, or vote in favor of or against, and Participate or decline to participate in any plan for or action concerning the liquidation, dissolution, reorganization, consolidation, merger, sale of assets or recapitalization of Beargrass Corporation only when directed in writing" by a majority of the Committee (paragraph 4.03).

13. The Trustee is also directed by paragraph 2.01 to pay"the entire net income from the Trust Estate" to the lifetime beneficiaries. Finally, paragraph 4.04 of the Trust Agreement requires First Kentucky to pledge the Beargrass stock to Tommy and Citizens Fidelity Bank and Trust Company (now PNC Bank) to secure Beargrass Corporation's obligations under the lease between it and the WMB Trust. First Kentucky interpreted these limitations to prevent the accumulation of income to purchase additional assets for the

Trust or to use the Beargrass stock as security for borrowing funds to purchase other assets for the Trust. In any event, it is uncontroverted that there were no assets in the trust other than the Beargrass stock.

14. On May 17, 1976, Robert Modys, Vice President of First Kentucky Trust and accounts officer for the NIB Trust, signed a proxy authorizing Tommy, Nora and John Osborn to vote the shares held in trust by First Kentucky at a special meeting of shareholders "for an increase in the Board of Directors from 3 to 5 directors, and for the election of Directors, and for the transaction of such other business as may properly be brought before the Meeting." The meeting took place as scheduled on May 20, 1976 and is set forth in minutes. The minutes reflected that the only actions that occurred at the meeting were the increase of directors from 3 to 5 and the election of John Osborn, Tommy, Nora, Nora Cameron and Kay Bullitt as directors.

The Convertible Debentures

15. The most controversial aspect of this case involves the facts and circumstances around the transaction called the"Convertible Debentures." Prior to 1977, no effort was made to borrow money for any purpose. The entire net income was distributed to the lifetime beneficiaries. The first years of the Beargrass operation, however, were not marked by financial success. Income was received from the joint venture, but no dividends were paid from 1969 until 1980. The reasons given for this were the fact that there were many costs attendant in operating a large shopping center and the need to stabilize the future as far as the business was concerned. John Osborn had much to do with these decisions in which he sought to protect all of the interests of the two trusts. Mr. Osborn's testimony appeared to be logical and, indeed, greatly influenced the jury as they found that he exercised good faith.

16. On April 21, 1977, Beargrass was informed by the operators of the shopping center, the Oxmoor Joint Venture, that additional capital was required for repairs to the Oxmoor Shopping Center necessitated by a defective roof, as well, as the bankruptcy and subsequent termination of its Gus Mayer lease. The question as to the acquisition of this money was apparently discussed at a Board of Directors meeting in June of 1977. There is no evidence that First Kentucky received notice of this meeting or had any notice of the issues that were raised at the meeting.

17. At a meeting of the Beargrass Corporation Board of Directors, which included Tommy and Nora, a majority of the Advisory Committee authorized an offering of convertible debentures to the Beargrass shareholders in an effort to raise the money necessary to put a roof on the shopping center. Parenthetically, at this point one might inquire as to why some other means of raising money for this repair might not have been in the best interests of some of the beneficiaries of the trust, but regardless of this, the fact is that the shareholders of Beargrass voted to raise the money by this convertible debenture method.

18. Debentures themselves are a form of unsecured bond. These debentures issued in 1977 had the additional feature of being convertible into common stock. John Osborn testified at length that he felt that because of the peculiar capitalization of Beargrass and specifically because it was obligated to pay out all of its net income, this method was optimal because it did not require an additional debt. Apparently, the jury, after hearing all of the evidence, felt Mr. Osborn's decision was correct.

19. On September 30, 1977, Beargrass made its subscription offer of the convertible debentures to the two shareholders, Tommy and First Kentucky. The offer gave the

shareholders the right to subscribe, in proportion to their respective ownership of shares in Beargrass, to all or any part of $350,000 principal amount of ten year eight percent Subordinated Convertible Registered Debentures. The debentures were convertible into common stock at any time prior to November 1, 1982 at $150.00 per share.

20. First Kentucky was not immediately aware of the decision to issue debentures. It did receive a notice that they had the opportunity to subscribe when it came to all of the shareholders from the Beargrass Corporation. Attached to the notice were the extracts of the minutes of the meeting at which the debentures were approved showing that the vote in favor of the issuance was unanimous and that the motion to issue the debentures were made by Nora.

21. At this point First Kentucky had no assets in the NIB Trust which they could use for purposes of purchasing the debentures, nor could it subscribe to the offer of convertible debentures on behalf of the NIB Trust. Kentucky Trust's response to this situation was made by Robert Modys, the trust officer responsible for the administration of the NIB Trust. He spoke to Barbara, a Floridian resident at the time, to see if she would be willing to purchase these debentures which could be used as lending money to the trust for repairs to the buildings. He also discussed the offering with Nora and with Tommy. There is some question whether or not Barbara and Nora were initially financially able to purchase any of the debentures, although both Barbara and Nora had recently received inheritances from their mother and their grandmother but notwithstanding this they declined to purchase any of the bonds. Only Tommy appeared to be interested in purchasing some $150,00.00 worth of convertible debentures, which when converted increased the percentage of his stock to 60%, giving him a decided advantage in voting at the shareholders and

directors meetings. The interests held for the benefit of the remaining shareholders was accordingly reduced to 40%.

22. There was no question that Beargrass Corporation prospered in the 1980's and continues to do so at this date.

23. Had some other means of raising money been decided upon by the Board of Directors of Beargrass corporation, the percentage of ownership would have remained the same as it was when the corporation was formed, and, indeed, when the trusts were instituted. In that instance, of course, Tommy would not have been in the position of owning 60% of the stock.

Through the means of convertible debentures and the inaction of Barbara and Nora when advised of the offer by Robert Modys, the Trust Officer, Tommy Bullitt was able to turn the $150,000.00 into control of Beargrass.

The question arises as to whether or not the trust company, in administering the trust, exercised ordinary care in performing their duties when they were notified of the offer of the convertible debentures.

Convertible Debentures, it can be said, are not understood by the majority of people, and indeed, the pros and cons of such kinds of financial dealings are not ordinarily understood by the average person. In a fiduciary capacity, the question is whether or not First Kentucky had a duty to do more than notify their beneficiaries of whether they were interested in investing $100,000.00 into this corporation.

24. The evidence is somewhat sparse as to whether or not Barbara and Nora understood what these bonds were. It is quite clear, however, that, after the fact, had they known

what Tommy was ultimately going to do they certainly would not have simply declined to purchase any of the debentures. However, these matters also were presented to the jury and they apparently felt that neither Kentucky Trust nor Tommy Bullitt acted in bad faith in this arrangement.

The PNC Branch Bank Lease

25. The Plaintiffs specifically attacked, among other things, the decision of PNC in entering into a lease with the WMB Trust for Oxmoor Farm's property on which a PNC branch bank was subsequently built. The bank, in fact, was built and is now located at 8000 Shelbyville Road, Louisville, Kentucky, near Oxmoor Mall.

26. The Branch Bank Lease and its subsequent amendments were negotiated by representatives of PNC's Retail Banking Division, including Mr. H. Frederick Zopp and Mr. Bill Molone. Tommy Bullitt, both in his capacity as Co-Trustee and as outright owner of the WMB Trust and as outright owner of a one-third undivided interest in the land actually negotiated the deal.

27. During those negotiations, the proof is fairly clear that Mr. Bullitt was negotiating in an attempt to get a lease in the trust's best interest. He had an additional incentive in that he owned one-third of whatever proceeds were to be received free and clear. The proof shows that he also acted in the best interest of the trust and himself in the various problems that developed with the leased property in subsequent years and renegotiations resulted in increases in the base rent as well as other advantages.

In 1993 PNC made rental payments to the WMB Trust and Tommy Bullitt in the sum of $560,845.00. Although

Plaintiffs contend that this was a "sweetheart" lease, the Court after considering the evidence, cannot say that it was.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the persons and subject matter. All of the parties in this action are residents of Kentucky or have had dealings directly within this jurisdiction. This Court has both jurisdiction over the persons and subject matter. KRS 386.690.

2. The defendant, Thomas W. Bullitt (now Estate of Thomas W. Bullitt), as Co-Trustee of the WMB Trust, exercised good faith towards the beneficiaries of the WMB Trust. proof shows that Thomas W. Bullitt, as an experienced businessman, had to contend between the desires of the income beneficiaries and the residual beneficiaries. In administering the trusts, he had to make decisions concerning the apportionment of income including borrowing money for necessary repairs on the assets of the businesses held by Beargrass. It is a well settled principle of law that a trustee is charged with the duty to invest so as to produce income, and at the same time use a sound discretion in regard to the preservation of the corpus. In other words, where there are successive beneficiaries the trustee is under duty to deal impartially with them. *Security Trust Co. v. Mahoney*, Ky.App., 212 S.W.2d 115 (1948). Accordingly, the Court finds, as did the jury, that Tommy Bullitt acted in a manner in which a man of ordinary prudence, diligence, discretion and judgment would act in the management of their own affairs. KRS 386.800(3).

3. The proof is insufficient to show that Tommy "dominated his sisters or exercised undue influence over them." Mrs. Bullitt's establishment of an Advisory Committee consisting of her three children to direct the trustee in its handling of Beargrass corporation stock was entirely proper.

Therefore, contrary to the Plaintiffs' contentions, the Court concludes that Barbara and Nora, as a majority of the Advisory Committee, had the power at any time to override Tommy's wishes in the event of a conflict.

4. The evidence is insufficient to establish that Tommy Bullitt dominated the banks and institutions which he dealt with or in which he had to exercise his fiduciary duties. KRS 386.800(3).

5. Although there may have been other methods of raising money to fulfill the needs of Bluegrass corporation which operated the Oxmoor shopping Center, the method of convertible debentures was not shown to be detrimental to either the business nor the heirs. The success of the venture establishes exclusively that the convertible debentures issuance benefitted Bluegrass Corporation and its shareholders, including the NIB Trust through First Kentucky Trust.

6. PNC Bank, as co-Trustee of the WMB Trust, exercised good faith towards the beneficiaries of the WMB Trust, with regard to the issuance of the convertible debentures by Beargrass Corporation. KRS 386.800(3).

7. PNC Bank fulfilled its duties to the beneficiaries of the WMB Trust with regard to the Beargrass Corporation's issuance of convertible debentures.

8. In his capacity as Co-Trustee of the WMB Trust, Thomas W. Bullitt exercised good faith toward negotiating the Branch Bank Lease with PNC's Retail Banking Division. As affirmed at trial by expert testimony, the Lease is now and has been since its inception a fair, equitable and lucrative lease for the WMB Trust and its beneficiaries.

9. Accordingly, Thomas W. Bullitt, fulfilled his duties to the beneficiaries of the WMB Trust. acting as a prudent man during his negotiations with PNC for the Branch Bank Lease and its subsequent renegotiations.

10. PNC Bank, as Co-Trustee of the WMB Trust, in entering into the Branch Bank Lease on the property owned by Thomas W. Bullitt and the WMB Trust, exercised good faith towards the beneficiaries of the WMB Trust. The negotiations for the original Lease and all subsequent renegotiations have been arms-length in nature. In light of all the factors, PNC Bank acted at all times in good faith, and with the prudence, diligence, discretion and judgment in entering into the Branch Bank Lease as would be expected of an individual acting in the management of his own affairs. KRS 386.800(3)

11. Accordingly, as stated above, PNC Bank fulfilled its duties to the beneficiaries of the WMB Trust in entering into the Branch Bank Lease.

12. Considering the tightrope that First Kentucky Trust had to walk with respect to both the lifetime and residual income beneficiaries of the Estate of their Trust, First Kentucky Trust Company acted in good faith and in a manner in which men of ordinary prudence, diligence, discretion and judgment would act in the management of their own affairs. KRS 366.800(3). See also, *Security Trust Co. v. Mahoney*, Ky.App., 212 S.W.2d 115 (1948).

13. First Kentucky's issuance of a Proxy for the May 20, 1976 shareholders meeting did not amount to a breach of duty. By the terms of the Trust, a majority of the Advisory Committee could direct First Kentucky to include Mr. Osborn if they so desired. Moreover, as indicated by the minutes, all three members of the proxy Committee attended the meeting and unanimously voted to increase the number of directors

from three to five and to elect John Osborn, Tommy, Nora, Nora Cameron and Kay Bullitt as directors.

14. Moreover, First Kentucky had no duty to prevent Beargrass Corporation from issuing convertible debentures. The resolution of this issue is controlled by the governing corporate documents of Beargrass Corporation and the applicable corporate law. Article I of Beargrass' Articles of Incorporation expressly allowed it to"issue its own bonds, debentures, notes, -securities and other obligations." (Emphasis added). Moreover, the power to issue debentures, common stock or convertible debentures, was not reserved to the Beargrass shareholders in the Articles of Incorporation. Therefore, this Court finds that the power to create and issue convertible debentures was reserved to the Beargrass Board of Directors, and not subject to the approval of the shareholders. See-KRS 2712.6-210.

15. First Kentucky as a shareholder of Beargrass Corporation had no duty to approve or disapprove of debenture issuance. It did not have a seat on the Beargrass Board of Directors, nor did it otherwise have a duty to control the Beargrass Board. As a shareholder, it could elect the board of directors "only as directed by Thomas W. Bullitt..., Nora B. Leake..., and Barbara B. Christian..., or a majority of them." Trust Agreement, section 4.02.

16. First Kentucky had no duty to seek judicial approval of the debenture issuance by bringing an action against the corporation and its directors. Under the terms of the Trust, a majority of Tommy, Nora and Barbara had the absolute power to direct First Kentucky in matters concerning the Beargrass stock;,thus, a suit against the directors including Tommy and Barbara wold have been contrary to the terms of the Trust.

17. There was insufficient evidence at trial to suggest that Beargrass Corporation Board of Directors decision to issue convertible debentures was a produce of fraud. Under the business judgment rule, the actions of the Beargrass Board were, and are now, presumed to have been made on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. *Moran v. Household International. Inc.*,Del., 500 A.2d 1346, 1356 (1985). See also *Sinclair Oil Corp. v. Levien*, Del., 280 A.2d 717, 720 (1971). Similarly, Kentucky law recognizes that "absent fraud, actual or constructive, the courts will not interfere with the management of a private corporation."*Security Trust Co. v. Dabney*, Ky., 372 S.W.2d 401, 406 (1963).Moreover, Plaintiffs put forth no evidence at trial to suggest that the Beargrass Corporation Board of Directors' decision to issue convertible debentures was the product of fraud. Accordingly, this Court finds that First Kentucky had no duty to look behind the board's decision and taken action, by instituting a lawsuit or otherwise, to oppose the debenture issuance.

18. First Kentucky had no duty under the Trust Agreement to oppose Beargrass Corporation's issuance of convertible debentures since it did not fall within the provisions of the Trust Agreement. In fact, Article 4.03, the provision under which the Plaintiffs contend that First Kentucky had a duty to oppose Beargrass Corporation's issuance of convertible debentures, has no application to the debenture issuance. In addition, the issuance was authorized by a unanimous board of directors, including a majority of the Advisory Committee appointed by Mrs. Bullitt to direct the trustee under Article 4.03 of the Trust Agreement.

19. First Kentucky did not breach its duty of disclosure to the beneficiaries concerning the issuance of convertible debentures. Nora and Tommy, who constituted a

majority of the Advisory Committee, had full knowledge of the debenture issuance because they were the directors. And when Mr. Modys telephoned Barbara to discuss the debenture issuance, she immediately responded that she had no interest in the matter. With a majority of the Advisory Committee having approved the debenture issuance, and the third member declaring that she had no interest in the matter, the Court finds that First Kentucky did not breach its duty of disclosure.

20. There is an absence of any evidence to indicate that the Beargrass Corporation had an unreasonable amount of retained earnings which should have been paid out through the NIB Trust. At trial, Mr. Osborn testified at great length as to the needs of the corporation, its cash requirements and its dividend policy. As stated above, the Court finds the judgment of the Board of Directors on this issue has been prudent, and, therefore, will not interfere with the management of the corporation concerning the amount of dividends declared.

21. After a two week trial. the jury heard the detailed evidence concerning the conduct of all the parties in the action, and after having been given instructions as an advisory jury, found for the Defendant on all questions. Considering that the nature of this lawsuit dealt with the business judgment and conduct of a deceased beneficiary whose actions produced a considerable amount of income to everyone concerned, and the resultant impact upon the beneficiaries is millions of dollars worth of equitable ownership in one of the largest shopping centers in this area, the Court cannot say that the jury's decision was incorrect.

Judgment

The Court having made its findings of fact and conclusions of law, it is ORDERED:

1. That Plaintiffs' Complaint, as amended is DISMISSED and all Defendants shall have judgment in their favor in all claims against them.

2. That Defendants may recover their costs for which they may have execution.

3. This is a final and appealable order and there is no just cause for delay.

/S/ Edwin A. Schroering, Jr.
EDWIN A. SCHROERING, JR., JUDGE

cc: Robert W. Griffith
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Edward K. Black
Robert I. Cusick
R. Van Young

RENDERED: March 18, 1993
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

92-SC-276-DG

FIRST KENTUCKY TRUST COMPANY

APPELLANT

v. ON REVIEW FROM COURT OF APPEALS
91-CA-196
JEFFERSON CIRCUIT COURT NO. 89-CI-9732

BARBARA BULLITT CHRISTIAN,
BARBARA PORTER WATKINS,
LOWRY WATKINS, JR. AND
MARSHALL BULLITT WATKINS

APPELLEES

OPINION OF THE COURT BY
JUSTICE WINTERSHEIMER

AFFIRMING AND REMANDING

This appeal is from a decision of the Court of Appeals which reversed a circuit court order granting summary judgment dismissing the claim against the trust company filed by trust beneficiaries for an alleged breach of fiduciary duty. The circuit court dismissed the action because it believed the suit was barred by the statute of limitations.

We have granted discretionary review because there appears to be genuine confusion as to the appropriate statute of limitations for an action against a trustee for breach of a

fiduciary duty. The principal issue is the appropriate statute of limitations.

The circuit court summarily dismissed the suit against the trustee because it held that an action must be brought within five years of the alleged breach pursuant to K.R.S. 413.120(5). A majority of the Court of Appeals reversed the circuit court holding that pursuant to K.R.S. 396.735 and K.R.S. 413.340, a suit could be brought any time during the existence of the trust as long as the trustee had not repudiated the trust. A dissenting Court of Appeals opinion asserted that the opinion of the majority was in contravention of *Potter v. Connecticut Mutual Life Insurance Company*, Ky., 361 S.W.2d 515 (1962).

In this case, the express inter vivos trust was created in 1969 by Nora Iasigi Bullitt. The original corpus of the trust consisted of 70 shares of Beargrass corporation common stock and had grown to 1500 shares by the time of Mrs. Bullitt'S death. The Beargrass corporation holds the leases on the land in Jefferson County on which the Oxmoor Shopping Mall is located. The trust directed that upon Nora's death, her son Thomas Bullitt would receive one-third of the trust assets, which was 500 shares, outright, with the remaining two-thirds of the trust, being 1,000 shares, to be held in trust by the First Kentucky Trust Company for the benefit of her two daughters, Barbara Bullitt Christian and Nora Bullitt Leake, with the remainder to their children and grandchildren.

In 1977, the Board of Directors of the Beargrass Corporation authorized the offer of convertible debentures to shareholders. The contractual subscription offer provided that, at the option of the holder, any time prior to November 1, 1982, the debentures were convertible into common stock at $150 per share. In 1977, a trust officer at First Kentucky discussed the subscription offer with Barbara Bullitt Christian because the trust had no cash or other liquid assets with which to purchase

the debentures. She stated that her family had no money to lend to the trust for such a purchase. Thomas Bullitt purchased a total of $150,000 in convertible debentures which he subsequently converted in 1979 to Beargrass stock. The additional stock gave Thomas Bullitt 60 percent of the corporate stock and reduced the interest held by the trust to 40 percent.

The other trust beneficiaries believed they had been damaged. This consolidated action, instituted separately by two beneficiaries and later joined by the remaining trust beneficiaries; was filed in 1989 claiming that First Kentucky breached its fiduciary duty by failing to properly disclose to them the consequences of the purchase of the debentures by Thomas Bullitt by failing to advise them of the available options to block his majority takeover, and by otherwise mismanaging trust assets. The circuit court dismissed the complaint on the grounds that it was not filed within the five year statute of limitations contained in K.R.S. 413.120 (5). The Court of Appeals reversed and held that K.R.S 395.735, not K.R.S. 413.120(5) was the applicable statute of limitations.

The legal question of this case involves the application of *Potter, supra*, which said by way of dicta that K.R.S. 413.340 has little, if any, significance as applied to trusts. The majority Court of Appeals' opinion declined to follow *Potter* on the grounds that it is distinguishable. K.R.S. 413.340 states "The provisions of this chapter shall not apply to a continuing or subsisting trust, nor to an action by a vendee of real estate in possession to obtain a conveyances" *Potter* contains the follwing language:

> Insofar as it applies to trusts, KRS 413.340 has little if any significance. It says and means merely that limitations will not run until there is a cause of action. A "subsisting trust" against

> which limitations do not run is neither more nor less than a trust in which the trustee is acting within his powers and the cestui que trust has no cause of action against him. see Bogert, Trusts and Trustees (2d ed.) Sec. 951. "The trusts intended to be embraced by the statute, and to be excepted out of the limitation, are those of an exclusively equitable character, where the trustee has a right to hold the estate, and the cestui que trust has no right to sue for it. Where, however, the latter has a right of action, and forbears to exercise it, the letter of our statute, as well as the policy of our law, gives the opposing party the right to rely upon the lapse of time." *Robinson's Committee v. Elam's Ex'x*, 1890, 90 Ky. 300, 14 S.W 94. since KRS 413.120 defines the period of limitation by reference to the accrual of the cause of action, KRS 413.340 merely gilds the lily.

The dissenting opinion in the Court of Appeals acknowledges that the *Potter* case is not factually similar to this case, and that some of the language in *Potter* was unnecessary to the decision of that court. However, the dissent maintains that because courts of this state have followed the decision as the definitive ruling on the question of the statute of limitations, the Court of Appeals could not refuse to follow it. *Cf. Salyers v. Allied Corporation*, 642 F. Supp 442 (1986).

First Kentucky argues that the *Potter* decision reflects general trust law from other jurisdictions and legal treatises and should be followed. First Kentucky interprets the initial clause of K.R.S. 395.735 as limiting the application of the statute to claims not already barred by K.R.S. 413.120. The suing beneficiaries claim that it is absurd to believe that a trust which continues to operate is not "continuing and subsisting" and that

they did not realize the extent of their damage until 1989, at which time they filed suit.

The facts of *Potter* were that the husband died and through testamentary trust left his estate to his widow "for and during her natural life, she to use the income therefrom, and so much of the principal thereof as necessary for her comfort" with the remainder on her death to their two children. Thereafter, the widow, using funds from the estate, purchased endowment policies, the proceeds of which her two children would receive as interest income for life, and at her death, with the remainder to her grandchildren in fee simple The insurance company executed a declaration of trust at the time of the widow's death in 1941. At various times in the next three years, two children of the widow demanded that the insurance company pay the face value of the policies to them. The insurance company refused and the two children of the widow took no action until 1958? when they sued the insurance company. The court held that under these facts, K.R.S. 413.120(5) was the applicable statute of limitations because, if the children had any claim, it was that the insurance company was withholding the insurance proceeds to which the two children were entitled from and after the time of their mother's death. K.R.S. 413.340 did not apply because at the time the widow died, the testamentary trust terminated and the insurance company held the estate adverse to the two children. Therefore, the testamentary trust was no longer a "continuing and subsisting trust."

In this case, the trust is not terminated and there is no allegation that the trustee withheld or converted trust assets. Here, the suing beneficiaries seek damages for breach of a fiduciary duty while the trust is continuing and subsisting. Therefore, we agree with the Court of Appeals that *Potter* and *Salyers, supra* are distinguishable from this case. We hold that K.R.S. 413.120(5) was not the appropriate statute of limitation

to be applied in this case. Consequently, in order to resolve this case properly and to be of guidance to the legal profession in general, we must now consider what is the appropriate statute of limitations here.

Bates v. Bates, 182 Ky. 566, 206 S.W. 800 (1918) held that in an action by beneficiaries against a trustee, the statute of limitations does not begin to run until the trustee repudiates the trust and the beneficiaries have notice of such repudiation. Repudiation has been defined as a rejection or refusal of an offer or available right or privilege or of a duty or relation. *See* Black's Law Dictionary 667 (5th ed., 1993). Bogert on Trusts and Trustees (2d ed.) states that repudiation must be unequivocal and in violation of the duties of the trust. Section 952 at 554-555. In this case it cannot be asserted that the action by the trustee as alleged in this suit amounts to a repudiation.

K.R.S. 396.735 provides that once a trust terminates and a final accounting is made, the beneficiaries have six months from the final accounting in which to bring their action unless there is a lack of full disclosure, in which case they have three years. If a trust terminates and the trustee continues to hold the assets adverse to the beneficiaries or the trustee has repudiated the trust and notice of the repudiation has been given to the beneficiary, a five-year statute of limitations in K.R.S. 413.120 would apply, subject to the extension allowed in K.R.S. 413.130 for fraud or mistake.

K.R.S. 413.340 does provide "The provisions of this chapter shall not apply to a continuing and subsisting trust, nor to an action by a vendee of real property in possession to obtain a conveyance." Therefore, it is the holding of this Court that an action against a trustee for breach of fiduciary duty where the trust is continuing and subsisting and no repudiation has occurred may be brought any time during the existence of the trust pursuant to K.R.S. 413.340 and K.R.S. 396.735.

It should be observed that the decision of the Court of Appeals does not comment on the violation of the standards for summary judgment recently reaffirmed in *Steelvest, Inc. v. Scansteel Service Center*, Ky., 807 S.W.2d 476 (1991). It is interesting to note that in *Steelvest, Peoples National Bank V. Guierra*, 294 Ky. 702, 145 S.W.2d 1042 (1940) was cited. That case held that a bank acted in bad faith by remaining passive and not taking any action to prevent a fiduciary from breaching his duties. *Williams v. City of Hillview*, Ky., 831 S.W.2d 181 (1992) reaffirmed that summary judgment is appropriate only where there is no room left for controversy and should be cautiously applied and not used as a substitute for trial.

The argument by the trust company that the 15-year statute of limitations for breach of a written contract applies here is unconvincing. certainly an express trust was created by contract, but we believe in this case the proper cause of action for breach of a fiduciary duty is controlling as an equitable rather than a technically legal action. Cf. Restatement (second) of Trusts, Sec. 199 (1959). Here, the duties of the trustee are not based on contract, but rather on the effect of the trust conveyance. Bogert, Trust and Trustees, Sec. 17 at 215 (Rev. 2d ed. 1982).

The decision of the court of Appeals is affirmed and this matter is remanded to the circuit court for trial on the merits.

Stephens, C.J., and Combs, Lambert, Leibson and Wintersheimer, JJ., concur. Reynolds, J., dissents by separate opinion in which Spain, J., joins.

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RENDERED: March 18, 1993
TO BE PUBLISHED

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DISSENTING OPINION BY JUSTICE REYNOLDS

I respectfully dissent from the majority opinion.

The majority punishes a party that deserves no punishment. The merits of the appellees' claim against the trustee are not at issue, but their submission of facts neither found nor contained in the record, along with charges involving Bullitt family disputes, serves no purpose but to create a distraction.

The majority opinion, skillful in part of its analysis, transcends the basic language of Articles 4.01, 4.02 and 4.03 of the trust agreement which clearly enunciates First Kentucky Trust Company's duties as trustee and reflectively discloses that

the trustee's power is quite limited. In brief, the trustee is prohibited from disposing of shares, voting the shares, or reorganizing unless directed by the beneficiaries or a majority of the beneficiaries.

The basic foundation of this case renders it a poor subject to effectuate a change in the law of trust. KRS 413.340 does not mean what the majority suggests, i.e., that there is no statute of limitations for a trustee's breach of fiduciary duty during the life of the trust. This particular statute provides only that the provisions of KRS Chapter 413 shall not apply to a continuing and subsisting trust. While the majority refers to the trust at issue as a continuing and subsisting trust, this particular instrument and the facts of this case do not rise to such a height. This court has previously correctly defined a subsisting trust to be one against which limitations do not run, and is one in which the trustee is acting within his powers and the *cestui que* trust has no cause of action against him. *Potter v. Connecticut Mutual Life Ins. Co.*, Ky., 361 S.W.2d 515 (1962), Bogert, Trusts and Trustees, (2d ed.) § 951.

If the heirs have a cause of action against the trustee, then, by definition, the trust cannot be a subsisting trust. KRS 413.340 cannot prevent the statute of limitations found in KRS 413.120(5) from running. A limitation will not run until there is a cause of action. *Potter*, 361 S.W.2d at 516. Other courts have come to rely on this Courts definition of a subsisting trust as enunciated in Potter. See, *e.g., Salvers v. Allied Corp.*, 642 F.Supp. 442 (E.D Ky. 1986). Quite candidly, our previous rule is just, workable and reasonable, and to continue with the *Potter* Court's interpretation of KRS 413.340 requires only that an injured party to whom a cause of action has accrued shall act within a statutorily designated period to seek redress. It appears that this particular statute is intended to do no more than to restate the common law rule that the statute of limitations does not apply to direct or express trusts (which were under the

exclusive jurisdiction of equity courts, as opposed to those trusts imposed by law) with respect to an action by a beneficiary to recover trust property from the trustee. The reasoning behind this common law rule was that possession of the trust property by the trustee was considered possession beneficially by the *cestui que* trust so long as the trustee continued to hold the trust property as trustee. During that period, no cause of action could accrue to obtain possession of the trust estate from the trustee. If, however, the trustee acted in repudiation of his trust, then an action to recover the trust property would lie and limitations would begin to run from the time of the repudiation or the time the repudiation became known by the *cestui que* trust. *See Robinson's Committee V. Ex'rx*, 90 Ky. 300, 14 S.W..84 (1890); *Bates v. Bates*, 192 Ky. 566, 206 S.W. 800 (1918).

This action is not one to recover possession of trust property from the trustee, but rather to obtain damages for the alleged negligent performance of a duty owed by a trustee to beneficiaries of the trust. I believe KRS 413.340 has no application to such an action and the trial court should be affirmed.

Spain, J., joins this dissent.